COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In re: Petition of Town of Foxborough Regarding Streetlight Purchase	)	D.T.E. - 02 - 30

Foxborough Response to Company Motion to Dismiss

The Company's motion should be denied, or set aside, for the following reasons.

1) **The right to make a motion to dismiss is a right given to parties in an adjudicatory proceeding.**

The motion to dismiss in the Department's regulation is a right given to "parties" at 220 CMR 1.06(e) "A party may move at any time after the submission of an initial filing for dismissal . . ." The Department regulations define the term "party" at 220 CMR 1.03(2) as follows: "party means (a) the specifically named persons whose legal rights, duties or privileges are being determined in an *adjudicatory proceeding before the Department* . . ." (Emphasis added.)

If this Section 34A streetlight dispute is an adjudicatory proceeding, the Company has the right to make a motion to dismiss. If this Section 34A streetlight dispute is not an adjudicatory proceeding, the Company has no such right.

2) **An adjudicatory proceeding is a proceeding before the Department in which a) the rights of a specifically named person are at issue, and b) that person has a statutory right or a constitutional right to a hearing, before those rights can be fairly adjudicated.**

G.L c 30A s 1(1) defines an adjudicatory proceeding as " a proceeding . . . in which the rights, duties or privileges of specifically named persons *are required by constitutional right or by any provision of the General laws to be determined after opportunity for an agency hearing*." (Emphasis added.) The Department adopts this definition in the Department regulations at 220 CMR 1.01 (3): "Adjudicatory Proceeding shall be as defined in MGL c 30A, s. 1(1)."

The case law regarding the right to a hearing and the right to the procedural protections of Chapter 30A limits the right to an adjudicatory proceeding to cases where a party can clearly establish a statutory right or constitutional right to a hearing. See 160 NE 2nd 108 (statutory right to a hearing in c 160 s 128 and 128A required the Department to conduct an adjudicatory proceeding and provide procedural protections defined in c 30A), 234 NE 2nd 752 (no right to an adjudicatory proceeding in hearings to inform Department decisions regarding questions of government policy), and 295 NE 2nd 876 (no constitutional right to a "trial type hearing" if the proceeding was regulatory, legislative, or political).

No court in Massachusetts has ever recognized a constitutional right to a hearing before the Department, or before the predecessor agency, the DPU. There is no statutory right to a hearing in section 34A. There is no statutory right to a hearing alleged by the Company. This streetlight dispute is not an adjudicatory proceeding. The Company has no right to make the motion to dismiss.

3) The motion to dismiss does not specify what exactly would be dismissed.

In the normal case, a motion to dismiss is a motion made by one party in an adjudicatory proceeding to dismiss the complaint of the other party in an adjudicatory proceeding. Since this streetlight dispute is not an adjudicatory proceeding, it is not clear what exactly the Company seeks to dismiss.

The petition in this streetlight dispute seeks Department clarification on the following questions of law:

1) What is the notice requirement in the Mass Electric S-5 tariff, which was filed in compliance with the Department's streetlight tariff ruling in DTE 98-69?

2) Does Section 34A requires the Company to provide a purchase price within 60 days of a Town request for such price?

3) The Town has asked for policy guidance on two questions regarding the interrelationship of the "unamortized balance of original installation costs" valuation standard in the discontinuance paragraph of the Company's S1 tariff and the "un-amortized investment" standard in section 34A; Are these two valuation standards one and the same, or are they different standards?

4) The Town has asked for policy guidance regarding the right of the Company to burden older lights targeted for a section 34A purchase, with the net value associated with newer lights that are not targeted for purchase.

The petition is seeking Department assistance in breaking an impasse in the negotiations with the Company. With answers to the above questions from the Department, the parties can meet again and negotiate a final agreement that gives effect to the policy guidance provided by the Department.

The Company motion to dismiss is out of order. It is a motion to dismiss the Department's right to issue a ruling interpreting the notice requirements in the Company's S5 tariff (which was filed to comply with the Department's Section 34A ruling in DTE 98-69). It is a motion to dismiss the Department's right to issue a ruling interpreting the Section 34A purchase price standard. It is a motion to dismiss the Department's statutory obligation to resolve this streetlight dispute. The Company's brief acknowledges that the parties have a dispute. The Company simply wants to dismiss the Department's involvement in that dispute.

4) The alternative tariff filed by the Company is available to S2 customers and S3 customers on the same terms.

The Company does not contest the fact that the S5 tariff is available to both S2 and S3 customers by the express terms of the S5 Availability Clause.

> "Street lighting Service is available under this rate to any municipal Customer that has purchased the Company's street lighting equipment pursuant to the Company's Rate S-2 . . . or S3 . . . provided that the Customer complies with all provisions and terms of the rates and any related service agreements." (DTE No.1027, Sheet 1)

The Company's position is that the above quoted language in the Company's S5 tariff availability clause, requires six month notices in the case of S2 lights and two months notice in the case of S3 lights. The Town cannot find any language in the S5 tariff, or the underlying S2 and S3 tariffs, that creates any such distinction. Specifically, the Town notes that:

1) The language in the availability clause of the S5 tariff is identical for S2 and S3 lights. Therefore, if there is a difference in the notice requirements, it must be in the underlying S2 and S3 tariffs;

2) However, both of the underlying tariffs specify a term that runs from year to year;

3) Both of the underlying tariffs have identical notice of termination provisions.

The Company has already accepted a two-month notice of conversion regarding approximately 100 S3 lights in the case of Haverhill (See DTE 00-37). Foxborough does not understand why the Company has interpreted this language as requiring two months notice in Haverhill, and now interprets the identical language as requiring six months notice in Foxborough.

5) The Company is attempting to make distinctions that defy common sense.

The Company does not contest the fact that the S5 tariff is the Section 34A "alternative tariff" filed in compliance with the Department's streetlight ruling in DTE 98-69. The Company does not contest the fact that this Section 34A alternative tariff is available by its express terms to S2 customers. The Company appears to be arguing, however, that this single S5 tariff is the Section 34A alternative tariff for S1 customers, but it is not the Section 34A alternative tariff for S2 customers.

The Company position is also unrealistic because it would force the parties to distinguish between S2 streetlights purchased before the Act was passed and S2 streetlights purchased after the Act was passed. Under the Company's logic, Section 34A applies to the latter, but not the former. According to Company's brief:

> "Because Foxborough did not purchase lights pursuant to M.G.L. c 164 s 34A, but has owned them for six years prior to enactment of the statute, Foxborough may not avail itself to the S-5 tariff immediately."

Does this mean that the statute applies to newly purchased S2 lights, but not to S2 lights purchased from the Company prior to enactment of the statute?

The Company's position requires a community with some S2 streetlights and some S1 streetlights, all of which the Town now wishes to convert to the lower alternative tariff, to go through two streetlights conversions, one that requires two months notice, and one that requires anywhere from six to eighteen months notice, depending on the time of year that the conversion notice is filed. This approach in turn requires two separate maintenance providers in the community at the same time, with residents attempting to figure out whom to call for their particular streetlight that may be out.

In the 13 communities in the Boston Edison service territory that have already converted their streetlights, one tariff, the alternative tariff authorized by Section 34A, applies to all of the streetlights in those communities, irrespective of the timing of the streetlight purchase. The Town of Foxborough does not believe that Section 34A means one thing in NSTAR's service territory and something entirely different in Mass Electric's service territory. It makes no sense to interpret the alternative tariff in one service territory as requiring only one conversion notice to accomplish a complete conversion to that alternative tariff, and two conversion notices, separated by 18 months in another service territory to accomplish a complete conversion.

6) The Company is attempting to enforce only selective portions of the underlying S2 tariff.

The underlying S2 service agreement provides that upon a termination of this agreement by Foxborough, either of the following shall occur, at the customer's option:

1) MECO shall remove the customer's streetlights from MECO owned poles at the expense of the customer in accordance with the applicable S-2 Rate Charge; or

2) MECO shall assume ownership of the streetlights at no cost with full title being passed to MECO. (See Town's petition at page B6.)

By design, in order for a customer to convert from the S2 tariff to the S5 tariff, the customer must retain ownership. Consequently, only the first option (removal of the streetlights from MECO owned poles) would be available to the customer, if this tariff provision applies. Why doesn't this underlying tariff provision regarding removal of the streetlights from MECO owned poles apply?

The Company is also ignoring the two provisions of the S2 service agreement that are most directly applicable to the fact pattern in Foxborough. Section 1 (b) and 1 (d) of that service agreement (see page B6 and B7 of the Town's petition), provide as follows:

> "(b) In the event that a new rate supercedes the S2 rate, *or MDPU-approved changes are made to the S2 rate,* the new or changed terms and conditions shall apply to this agreement, instead of the terms and conditions now set forth in M.D.P.U. No. 671" (Emphasis added.)
>
> "(d) In the event that a *change in the S-2 rate* creates an unintended gap or leaves uncertain the obligations of the parties, the terms of this agreement shall be construed in such a way as to be consistent with the new or changed S-2 rate until the parties negotiate a good faith modification to correct the gap or uncertainty." (Emphasis added.)

The S-2 rate is now closed to new customers. Communities without any S2 streetlights, wishing to own their streetlights, may not access the S2 rate. The only "town ownership streetlight service" available to that customer is the S5 tariff. Any grandfathered community, such as Foxborough, that implements a conversion from the S2 tariff to the S5 tariff, may not thereafter access the S2 tariff. The S-2 tariff will then be closed to Foxborough. For the purposes of section 1(b), the Town believes the S2 rate has been superceded by the S5 rate. However, whether it has been superceded or not, the S2 rate has certainly been changed.

The closing of the S2 rate to new customers, the closing of the S2 rate to grandfathered customers following a conversion to the S5 rate, the procedures now introduced for converting from the S2 rate to the S5 rate, all represent "changes" to the S2 tariff that represent "M.D.P.U. approved changes" within the meaning of paragraph 1 (b), as well as " a change in the S-2 rate (that) creates an unintended gap or leaves uncertain the obligations of the parties" within the meaning of paragraph 1 (d). In either case the result is the same. The new rules apply.

Based on the "two-month notice" precedent set by MECO in Haverhill with respect to S3 equipment purchased prior to enactment of the Act, and based on the fact that the express language of the S5 tariff, which makes absolutely no distinction between the notice of termination provisions regarding S2 and S3 customers, the new rules clearly require two months notice.

The Company is picking and choosing which aspects of the underlying S2 tariff should apply to this streetlight conversion in Foxborough. According to the Company, the six to eighteen month notice of termination provision in the S2 tariff does apply, even though the identical six to eighteen month notice of termination provision in the S3 tariff does not apply. According to the Company the pole removal provisions of the S2 tariff do not apply, and sections 1 (b) and 1 (d) quoted above, do not apply. Mass Electric is arguing that their S-5 tariff is the "Section 34A alternative tariff" for one class of streetlights, but not another class of streetlights. Apparently the S2 lights are covered by some secret mix of S5 and S2 provisions, known only to Mass. Electric.

7) The Town has the right to request a determination regarding the Section 34A purchase price standard.

The Company has found a new way to fight streetlight conversions: simply refuse to provide a price. The Company now claims that the Company is willing, and has been willing, without any conditions, to provide the purchase price they have allegedly developed. If so, simply deliver the purchase price that was requested by the Town more than six months ago. It is frankly embarrassing that the Town needs to resort to this dispute remedy just to force the Company to provide the purchase price information that the Company is required to provide under the statute.

The Company argues that there is no timing requirement in the statute regarding the furnishing of this information. The Town requested this information more than six months ago in a conversion notice that referenced both the S2 and the S1 streetlights. The Town requested the information in the Town's conversion notice so that the town could evaluate the inclusion of the S1 streetlights, or portions of the S1 streetlights in the Town's streetlight conversion. The Company's refusal to provide a price effectively eliminated the Town's right to convert the S1 streetlights to the alternative tariff on 60 days notice.

The Town also has the right to request a Section 34A Department determination regarding the Town's right to a purchase price that is based on the unamortized balance of the original installation costs of the particular streetlights targeted for conversion by the Town. The Company believes that the Company is entitled to provide only an average price that burdens the targeted lights with the unamortized investment allocable to newer lights not targeted for purchase. The Town disagrees.

8) The Department has the authority to grant the relief requested.

The Company does not contest that there is a disagreement regarding the notice requirement in the S5 tariff. The factual positions are clear. The Department has the authority to interpret the notice provisions of the S5 tariff.

The Company does not contest the fact that the Town requested a price in the Town's November 1, 2001 conversion notice. The Company argues there is no statutory deadline. The Department has authority to determine whether the Town is entitled to a purchase price within 60 days of the Town's request.

The Company does not contest the fact that the Company believes the Company has the right to offer an average price. The Department has the authority to determine if the Company's purchase price must relate only to the un-amortized balance of the streetlights targeted by the Town for purchase.

The Town has the right to request the assistance of the Department in resolving the policy disputes presented in the Town's petition.

Conclusion

The Town recommends that the motion to dismiss either be denied, or be set aside as an inappropriate motion in a streetlight dispute. The Town recommends that the parties move to briefs on the questions of law presented in the Town's petition.

Respectfully Submitted,
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